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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1208

SIDNEY A. LITTMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on January 21, 1970. The petition for a writ of certiorari was filed on February 19, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the admission in evidence of a statement of a co-conspirator referring to petitioner, which the trial judge thereafter instructed the jury

not to consider against petitioner, requires reversal under *Bruton* v. *United States,* 391 U.S. 123.

2. Whether a taped recording of a telephone conversation between petitioner and a witness, made by the witness without government authorization or suggestion, and not played to the jury, was properly admitted in evidence.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner and five others were convicted of traveling in interstate commerce to carry out an extortion scheme (one count), wire fraud (five counts), mail fraud (two counts), and conspiracy to commit these substantive offenses, in violation of 18 U.S.C. 371, 1341, 1343, and 1952.[1] On June 9, 1969, he was sentenced to imprisonment for six months on the conspiracy count and to three years' probation on the remaining counts. The court of appeals affirmed, one judge dissenting (Pet. App. A).

In December 1967, co-defendant Marino told one George Desser that he had contacts within the Cadillac Car Division of General Motors, and was thereby able to secure Cadillac franchises in the New York City and nearby New Jersey areas. Marino identified his insiders as "Hank," who lived in Detroit and was in charge of all Cadillac agencies on the east coast, and "Arthur," who served the east coast distribution center in Teaneck, New Jersey (Tr. 485,

[1] A sixth co-defendant, James Reynolds, entered pleas of guilty to conspiracy and two of the substantive counts, and was severed. He testified for the government at petitioner's trial.

491–492).[2] Marino convinced Desser to furnish capital, initially for the purchase of individual automobiles at discount prices for resale at a profit, and later for the acquisition of a Cadillac agency in Monmouth County, New Jersey (Tr. 484, 491, 496). Marino showed Desser a letter on Cadillac stationery indicating that an agency was forthcoming (Tr. 492–493, G. Ex. 19). During December, Desser and an associate (Irving Bernstein) gave Marino $23,000 for car purchases, and $100,000 for the agency.

Marino introduced petitioner as the attorney who would handle the legal work. In petitioner's presence, Marino said that petitioner knew "Hank" and "Arthur", and had previously performed work for them (Tr. 500–501, 506–507). In mid-January 1968, Desser and Bernstein each invested another $50,000 with Marino for a second Cadillac agency, in Plainview, Long Island (Tr. 508–512). In fact, neither "Hank," "Arthur," the Monmouth County nor the Plainview agency ever existed (Tr. 881–882, 925), and the letter purporting to have come from Cadillac was false (Tr. 885–886).

Within the next month, investments in two more agencies were discussed. Desser and Bernstein were introduced to co-defendants James Reynolds and Marie McGinley, whom Marino identified as "Hank's" public relations man and his girl friend (Tr. 513, 533). In fact, Reynolds had never been connected with Cadillac, and Miss McGinley was Marino's girl

[2] "Tr." refers to the eight-volume transcript of trial, filed with the Clerk of this Court.

friend. Both had been schooled in their roles by Marino (Tr. 921–923).

By this time Desser and Bernstein had invested a total of $400,000 (Tr. 521–522). At a meeting in petitioner's law office in February 1968, they expressed a desire that sufficient security be deposited for their investment. Petitioner agreed to hold $400,000 in General Motors stock, which he was to "receive" from "Hank" and "Arthur" (Tr. 519). Later that month, petitioner notified Desser that the stock had been deposited with him (Tr. 568).

That same month, Marino told Desser and Bernstein that he could obtain an agency at 59th Street and 5th Avenue in New York City. Another partner in that venture was to be one Hy Kauf, and ultimately, his three nephews, Philip, Sidney, and Jerry Shapiro (Tr. 538–539).

On February 21, 1968, petitioner and the Shapiros entered into a formal agreement whereby they would turn over $250,000 to be held in escrow by petitioner until the Cadillac agency was awarded or until July 1, 1968. If the partnership was not selected for the franchise, petitioner was to return their money (Tr. 59–61). Philip Shapiro gave petitioner a check for $100,000 and thereafter a check for $150,000. Petitioner stated that he wanted to cash the checks and place the money in his safety deposit box (Tr. 299, see Tr. 63–65).

In March, April, and May, the Shapiros became involved in the same type of car deals as Desser and Bernstein, both for individual cars and for fictitious agencies (Tr. 71–74, 82–84). Large sums of money

and receipts for car purchases were deposited with petitioner in escrow for these ventures (Tr. 79–80, 93). The receipts were false (Tr. 94, 891). Petitioner commingled the escrowed moneys with his personal bank accounts, from which he disbursed large amounts to Marino or his creditors as well as to himself (Tr. 870–875, 938).

Thereafter, Marino, who had obtained $1,300,000 from Desser, Bernstein and the Shapiros, told his victims a fictitious story about an "eccentric millionaire" who enjoyed wagering on horses, but invariably lost (Tr. 104–107, 540–545). He stated that co-defendant Borgese, his driver, had made a great deal of money booking these bets, and that Reynolds, "Hank," "Arthur," and himself were backers of Borgese (Tr. 103, 546–547). In March 1968, after some urging by Marino, Desser and Bernstein agreed to involve themselves as backers. The Shapiro brothers reluctantly consented in May (Tr. 108, 548). Thereafter, Marino and Borgese announced the amount of "wins" or "losses" weekly.

The victims were ahead of the game until the week designated by Marino for the "hit." For Desser and Bernstein the "hit" would come in the week of May 13; for the Shapiros, two weeks later (Tr. 110, 559). The "hit" involved a bet of "last for last," that is, the horse with the heaviest odds was wagered to come in last in every race. Such a wager inevitably would cause the backers to suffer staggering losses.

A few days before the scheme was to be executed against Desser and Bernstein, Marino met with petitioner and co-defendant Reynolds. Petitioner asked,

"When are you going to make it last for last?" (Tr. 950). When told that it was about to be done, petitioner asked, "Well, who is going to take the beating this time?" (Tr. 948). He was told who the victims would be, and was directed to be available the following Sunday, May 19, to prepare releases of the escrow agreements (Tr. 948–949).

On Thursday, May 16, a meeting was held at which final arrangements were made for the "hit." Borgese was instructed to inform Desser and Bernstein that the bet for that week had been "last for last." Once the amount of losses was computed, co-defendants Alfano (Marino's neighbor) and Petrozelli (Alfano's relative) were to pretend to be strong-arm agents of the "millionaire," who would threaten Desser and Bernstein with death if they refused to pay their share. A feigned beating of Marino was arranged to show the victims that the thugs intended to carry out their threats (Tr. 950–951). All of these plans were carried out with the desired effect (Tr. 583–589).

Early Sunday morning, May 19, Desser called petitioner and told him that he was in fear of his life because he had been threatened with a gun the prior evening and he had seen Marino after he had been "beaten" by four men. Desser asked petitioner to call "Arthur." An hour or so later petitioner called Desser and reported that he could not reach Arthur (Tr. 587–589).

That evening, Desser, Bernstein, Marino and Reynolds met. After some discussion concerning what had occurred, Marino suggested, as a settlement of the debt owed by Desser and Bernstein, that they release their

escrow money and pay $50,000 each (Tr. 590–598). Marino then called petitioner, who thereafter arrived carrying release forms and a portable typewriter (Tr. 598, 955–956). Out of the hearing of Desser and Bernstein, petitioner said to Marino, "So they agreed to give up the releases." Marino responded by smiling (Tr. 957–958). Petitioner then prepared the releases, which Desser and Bernstein signed (Tr. 602–604).

The next day Desser removed all of his savings—about $38,000—which he delivered to Marino. Bernstein turned over $50,000 (Tr. 604–607). Marino told Desser that he and Bernstein would be relieved of any further debt, but that Desser was not to talk to the Shapiro brothers about it (Tr. 611–613). For the next few days Desser and his wife received threatening telephone calls from Marino and Petrozelli to assure their silence (Tr. 618, 622).

Two days after he prepared the Desser-Bernstein releases, petitioner accepted from the Shapiros two checks totalling $250,000, representing the balance of their investment in a fictitious Cadillac agency (Tr. 94). The Shapiros learned of the "last-for-last" bet from Reynolds by telephone on Monday, May 27. They tried to withdraw from the scheme but were told by Borgese that they had to remain with the betting for the remainder of the week (Tr. 111–112). Petrozelli then commenced to apply various scare tactics either by telephone or in person. Each time he warned the Shapiro brothers that they would be expected to pay their share of the losses the following Friday. On May 27, Petrozelli and Alfano visited the Shapiros' place of business and threatened that they and their

families would be killed and their apartments destroyed if they sought to avoid payment (Tr. 117, 125, see also Tr. 142–143).

On June 3, Philip Shapiro reported the incidents to the FBI. Bergese was arrested on June 4 when he came to the Shapiros' offices to collect (Tr. 144, 156). The next day Marino arranged for petitioner to be given a forged certified check—which petitioner would pretend not to recognize as being fraudulent—covering the amount of the Shapiros' investment held in escrow, $750,000. Marino then dictated a letter to the Shapiros, signed by Reynolds, that "unknown to Sidney Littman" he (Reynolds) and Petroselli had removed the escrow moneys in exchange for a worthless certified check, and that there was nothing to gain by further cooperation with the police (Tr. 171–175, 989–990). After he received the letter, Philip Shapiro received a call from petitioner informing him that he had been given a false certified check in exchange for the escrow funds. When asked why he had taken the bad check, petitioner stated that he had been pressured to do so (Tr. 180).

ARGUMENT

1. After testifying to his involvement in the Cadillac agency and betting transactions outlined above, Dezner stated that he and his wife began to receive threatening telephone calls from Petroselli and Marino. During one of these conversations, on May 25, while the Shapiros were trying to withdraw from the betting swindle, Dezner listened in on an extension line to a conversation between Marino and Mrs.

Deaser in which Marino said, "Mr. Littman is the only swindler in our gang—" (Tr. 622). At this point defense counsel objected and the court instructed the jury that the comment would be taken subject to connection, and could only be considered against petitioner if the jury first found that there was a conspiracy, that petitioner was a part thereof, and that the statement was made during the life of and in furtherance of the conspiracy. The court then allowed the witness to complete the sentence. Deaser then testified that Marino said, "Mr. Littman is the only swindler in our gang that has a law degree and I need him for the legal end of our scheme" (Tr. 622). Thereafter, the court stated that he agreed with petitioner's counsel that the comment should be admissible only against Marino and instructed the jury:

> Now I have stricken that from the record. That is not evidence in the case. The only one that that statement is binding is Mr. Marino. It does not bind Mr. Littman. * * * The only one you may consider against at all is Marino, and that is all.

Petitioner contends that the admission of this remark, even with the insulating instruction, violated the rule of *Bruton* v. *United States*, 391 U.S. 123. As the court below held, however, the distinctions between this case and *Bruton* are readily apparent. This case does not involve a post-arrest confession of a co-defendant, with its likely impact upon the jurors, but rather a reference by a witness to the remarks of a co-conspirator, in furtherance and during the course of a conspiracy. See Judge Anderson's con-

curring opinion in the court below, Pet. App. 7a–8a. As such, it was admissible against petitioner. See *Parness* v. *United States*, 415 F. 2d 346 (C.A. 3); *Campbell* v. *United States*, 415 F. 2d 356 (C.A. 6); cf. *Bruton*, *supra*, 391 U.S. at 128 n. 3. The district judge accorded petitioner an undeserved benefit when he ordered the jury not to consider the statement in deliberating upon petitioner's guilt. The explanation and cautionary instructions of the court were precise and simple and could not have been misunderstood. See *United States* v. *Corallo*, 413 F. 2d 1306 (C.A. 2), certiorari denied, 396 U.S. 958.[1]

In addition, the evidence of petitioner's guilt as set forth above was overwhelming, wholly apart from any effect which the challenged comment might have had. The record is abundant with competent evidence that petitioner was an active participant in the conspiracy. In this context, error, if any, in the trial court's treatment of this issue was harmless beyond a reasonable doubt. *Harrington* v. *California*, 395 U.S. 250; see *James* v. *United States*, 416 F. 2d 467, 475 (C.A. 5), certiorari denied, February 24, 1970 (No. 746, this Term); *Slawek* v. *United States*, 413 F. 2d 957 (C.A. 8); *Clark* v. *United States*, 412 F. 2d 491 (C.A. 9), certiorari denied, 396 U.S. 919; *United States* v. *Levinson*, 405 F. 2d 971 (C.A. 6), certiorari denied, 395 U.S. 958; *United States* v. *Lipowitz*, 401 F. 2d 591 (C.A. 3), certiorari denied *sub nom. Muller* v. *United States*, 395 U.S. 924.

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[1] "It is not unreasonable to conclude that in many * * * cases the jury can and will follow the trial judge's instructions to disregard [hearsay] information." *Bruton*, *supra*, 391 U.S. at 135.

2. Philip Shapiro testified that for at least eight months prior to June 1968, he had owned a device capable of recording telephone conversations; that after he reported the fraud to the FBI he began to record all telephone conversations with certain of the defendants; and that the FBI neither knew nor suggested that he make these recordings (Tr. 198–225). The tape recordings were admitted in evidence over objection of defense counsel (Tr. 225–231). After hearing the tapes outside the jury's presence, petitioner's counsel stated that the tapes should not be played because, as to petitioner, their prejudicial impact would outweight their admissibility (Tr. 239). The court ruled that the tapes were cumulative and would not be played, but that if a dispute arose regarding the substance of the conversations, he would let the jury hear the tapes (Tr. 1002–1003). The tapes were never played to the jury. Petitioner's allegations (Pet. 18, 21) that the recordings were made at the instigation of the government and that they were exculpatory thus find no support in the record.

At all events, the admission in evidence of the one tape recording of a conversation with petitioner did not violate any of petitioner's rights. When talking to Shapiro on the telephone, petitioner assumed the risk that the latter might record their conversation. There was no interference with any justifiable expectation of privacy on petitioner's part, and hence no constitutional or statutory violation. The decision in *Katz* v. *United States*, 389 U.S. 347, did not overrule the Court's decision in *Rathbun* v. *United States*, 355 U.S. 107. There is thus no reason to delay dis-

position of the instant case pending decision in *United States* v. *White*, No. 46, this Term, set down for reargument on January 19, 1970, involving the consensual carrying of a radio transmitter. See the government's brief in opposition in *Fukumoto* v. *United States*, No. 1359 Misc., this Term.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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